

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH WATSON,)
) No. 335, 2009
Defendant Below,)
Appellant,) Court Below: Superior Court
) of the State of Delaware in
v.) and for Kent County
)
STATE OF DELAWARE,) Cr. ID No. 0805039240
) CR A. Nos. IK08-09-0857 thru 0859
Plaintiff Below,)
Appellee.)

Submitted: October 28, 2009

Decided: January 6, 2010

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 6th day of January 2010, it appears to the Court that:

(1) Kenneth Watson appeals from a final judgment of conviction for Resisting Arrest with Force and Violence¹ against two probation officers. In the initial briefing, Watson claims the Superior Court judge erroneously denied his request for a lesser included offense instruction on Misdemeanor Resisting Arrest, contending that the facts support a finding that he did not use force or violence. Although neither party raised the threshold concern about whether the Felony Resisting Arrest statute governs probation officers, we requested supplemental

¹ Felony Resisting Arrest, 11 *Del. C.* § 1157(a).

briefing from the parties and now address this issue. We hold the statute addresses only “police officers” and, therefore, does not apply to probation officers. Therefore, we REVERSE the judgment of conviction and REMAND to the Superior Court for action consistent with this Order.

(2) On May 27, 2008, Probation Officers Allison Justiniano, Katherine Giannone, and Matthew Rahe arrived at the House of Pride in Dover, Delaware to arrest Watson for violating his probation. The officers proceeded to Watson’s room on the second floor and found him lying in bed with the lights off. Officers Rahe and Justiniano entered the bedroom while Officer Giannone waited outside the doorway. Officer Rahe ordered Watson to stand up and to place his hands behind his back. Watson stood up but refused to put his hands behind his back.

(3) Upon Watson’s steadfast refusal to comply with the order, Officers Rahe and Justiniano seized Watson’s arms and a struggle ensued. Because of the struggle, Officers Justiniano and Rahe sustained several injuries.² Eventually, the officers brought Watson down to the floor—but to no avail. Watson managed to roll out from under the officers and flee the building. The probation officers pursued Watson but lost track of him and Watson escaped.

² Officer Justiniano suffered deep bruising on the left side of her body (from her shoulder to her calf), an injury to her right knee and soreness in her back. Officer Rahe sustained an inch long cut on his right hand and a bruise on his left forearm.

(4) Police apprehended Watson on August 12, 2008. On October 6, 2008, a grand jury indicted him on two counts of Second Degree Assault on a Law Enforcement Officer and one count of Felony Resisting Arrest. At trial, the State offered the testimony of all three probation officers, as well as photos of Officer Justiniano's injuries. Although Watson elected not to testify, his attorney implied during closing argument that the officers' use of excessive force caused their respective injuries.

(5) Watson requested a jury instruction on the lesser included offense, Misdemeanor Resisting Arrest. The trial judge found insufficient evidence to support that instruction and denied the motion. On March 17, the jury acquitted Watson on the assault charges but convicted him of Felony Resisting Arrest.³ This appeal followed.

(6) Before (and without) reaching the substance of Watson's original assignment of error, the trial judge's failure to instruct on Misdemeanor Resisting Arrest absent the use of force or violence, we are compelled to address whether the Felony Resisting Arrest statute governs Watson's circumstances.

(7) As in all statutory interpretation cases, our inquiry begins with the General Assembly's language. Statutory construction mandates that we "ascertain

³ Based on the Felony Resisting Arrest conviction and pursuant to 11 *Del. C.* § 4214(a), the sentencing judge declared Watson a habitual offender.

and give effect to the intent of the legislature.”⁴ “Because a statute passed by the General Assembly is to be considered as a whole, rather than in parts, each section should be read in light of all others in the enactment.”⁵

(8) Originally, 11 *Del. C.* § 1257 defined resisting arrest as the intentional prevention or attempted prevention of a peace officer from effecting an arrest or detention. In 2006, the General Assembly amended 11 *Del. C.* § 1257 to provide for Felony Resisting Arrest in a new subsection, (a), that refers to “police officers.” The original Resisting Arrest provision, which referred to “peace officers,” was redesignated Misdemeanor Resisting Arrest in a new subsection, (b).

(9) In *Dickerson v. State*⁶, we interpreted the newly amended Felony Resisting Arrest statute and noted that to prove Felony Resisting Arrest, the State must establish that the defendant either: (i) prevents or attempts to prevent an arrest by using force or violence against a *police officer* attempting to effect an arrest; (ii) intentionally flees by using force or violence towards *such an officer*; or (iii) injures *such an officer* or struggles with the officer in a way that results in injury to the officer.⁷ Contrarily, a person may be found guilty of Misdemeanor

⁴ *Coastal Barge Corp. v. Coastal Zone Ind. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985).

⁵ *Delaware Bay Surgical Serv. v. Patrick Swier*, 900 A.2d 646, 652 (Del. 2006) (citing *Coastal Barge*, 492 A.2d at 124; *see also Philbrook v. Glodgett*, 421 U.S. 707 (1974)).

⁶ 975 A.2d 791 (Del. 2009).

⁷ 11 *Del. C.* § 1257(a) (emphases added). *See also Dickerson*, 975 A.2d at 798.

Resisting Arrest when he intentionally flees from a *peace officer* or prevents or attempts to prevent a *peace officer* from effecting an arrest.⁸

(10) We assume that the General Assembly “inserted every provision into a legislative enactment for some useful purpose and construction;”⁹ thus, when the General Assembly chooses to employ different terms in various parts of a statute, we find it equally reasonable to assume that the General Assembly intended to distinguish between those terms. Reading the newly amended § 1257 *in para materia* and in light of those presumptions, we find that the Delaware Criminal Code sets forth a clear intent to distinguish between a police officer and a peace officer.

(11) Our finding, that there is a distinction between a police officer and a peace officer, also derives support from the statutory definition of a police officer.

11 *Del. C.* § 1911 defines a police officer as:

[a]ny police officer holding current certification by the Council on Police Training as provided by Chapter 84 of this title *and* who is:

- (1) A member of the Delaware State Police
- (2) A member of the New Castle County Police;
- (3) A member of the police department, bureau or force of any incorporated city or town;
- (4) A member of the Delaware River and Bay Authority Police;
- (5) A member of the Capitol Police;
- (6) A member of the University of Delaware Police; or

⁸ 11 *Del. C.* § 1257(b).

⁹ *Colonial Ins. Co. v. Ayers*, 772 A.2d 177, 181 (Del. 2001).

- (7) A law enforcement officer of the Department of Natural Resources and Environmental Control.¹⁰

According to an opinion set forth by the Attorney General, one must preserve the integrity of the use of the conjunction, *and*, and meet both requirements listed above to be a police officer. Specifically, one must hold current certification from the Council on Police Training and be a member of one of the enumerated police departments. We applaud “[p]ersons like constables, parole officers, correctional officers and the Attorney General and her Deputy Attorney General,” for their commendable services and recognize that they may have certain law enforcement authority; nevertheless, that does not define them as police officers.¹¹ That conclusion applies even if those individuals received certification from the Council on Police Training.¹² Because certain officers, including probation officers, are not members of one of the enumerated police departments, they do not meet the second requirement and are not *police* officers within the meaning of the statute.

(12) To further reinforce the distinction, 11 *Del. C.* § 4321(d) states, “probation and parole officers shall exercise the same powers as constables under the laws of [Delaware]” 11 *Del. C.* § 8401(5), which governs the Delaware

¹⁰ 11 *Del. C.* § 1911 (emphasis added).

¹¹ *Re: Opinion of the Attorney General relating to the Sheriff as a Police Officer*, Del. Op. Att’y Gen. 00-IB16, 2000 WL 1920107 at *1 (Oct. 16, 2000).

¹² *Id.*

Police Training Program, provides that the term, police officer, shall *not* include “[a] sheriff, regular deputy sheriff or *constable*.”¹³ Considering that the General Assembly equated a probation officer’s powers to those of a constable in 11 *Del. C.* § 4321(d), and 11 *Del. C.* § 8401(5) specifically excludes a constable from its definition of a police officer, it is reasonable to conclude that the General Assembly recognizes differences, as a matter of policy, between probation officers and police officers. It is not within our province to second guess that policy decision.

(13) Given that under the present Delaware statutory scheme, probation officers are not police officers, we find the Felony Resisting Arrest statute inapplicable to Watson’s circumstances and reverse his conviction. Watson offered no credible support of his version of the facts: that the probation officers sustained injuries by their own use of excessive force at trial. His counsel merely proffered an argument during closing. We, therefore, find no basis for a new trial.¹⁴ We must, however, remand to the Superior Court with instructions to enter

¹³ Emphasis added.

¹⁴ *Jones v. State*, 940 A.2d 1, 17 (Del. 2007) (“arguments made by counsel during opening statements and summation are not evidence and thus cannot be said to raise an affirmative defense”) (internal citation omitted).

a judgment of conviction for the lesser included offense – Misdemeanor Resisting Arrest and sentence accordingly.¹⁵

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is REVERSED and REMANDED for further proceedings consistent with this Order.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

¹⁵ *Oney v. State*, 397 A.2d 1374, 1376-77 (Del. 1979); *Waters v. State*, 443 A.2d 500, 506 (Del. 1981); *Miller v. State*, 426 A.2d 842, 845 (Del. 1981); *Oxendine v. State*, 528 A.2d 870, 874 (Del. 1987); *Addison v. State*, 2001 WL 760852 (Del. May 30, 2001); *see also Comer v. State*, 977 A.2d 334, 343 (Del. 2009).